

NationsBank Corporation  
Legal Department  
NationsBank Corporate Center  
100 North Tryon Street, NC1-007-20-01  
Charlotte, NC 28255

VIA OVERNIGHT DELIVERY

March 26, 1997

Mr. Steven J. Weiss  
Deputy Comptroller  
Bank Organization & Structure  
Office of the Comptroller of the Currency  
250 E Street, S.W.  
Washington, DC 20219

Re: Application for Permission to Establish an Operating Subsidiary to  
Engage in Limited Real Estate Development Activities

Dear Mr. Weiss:

Pursuant to 12 C.F.R. § 5.34, NationsBank, National Association, Charter Number 14448 (“NationsBank” or the “Bank”) requests the approval of the Office of the Comptroller of the Currency (the “OCC”) to engage in limited real estate development activities through a newly established operating subsidiary to be known as Tryon Development Partners ( the “Subsidiary”). NationsBank, an “eligible bank” as defined in Section 5.3(g), is filing this application pursuant to Sections 5.34(e)(1) and 5.34(f) for permission to engage in activities that are part of or incidental to the business of banking, but are different from those permissible for a national bank.

I. Description of Proposed Activities

Through the Subsidiary, NationsBank proposes to engage in the development of real estate in locations that NationsBank already occupies through the maintenance of bank premises. NationsBank is applying for these powers in order to gain increased flexibility in enhancing its premises locations by making them economically more vibrant. This flexibility will better enable NationsBank to contribute to the communities in which it operates as well as to make a safer, more pleasant work environment for its employees and customers.

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At this time, NationsBank is considering a single specific project. Although NationsBank intends to develop future projects, in order to ensure that these future projects are consistent with the narrow parameters set forth below, NationsBank will submit a detailed description to the OCC of any future project for its prior approval.

Currently, NationsBank is considering sponsoring the development of a building to be located in Charlotte which would house approximately 45 residential condominium units. Most of the land on which the condominiums will be constructed has been owned for over 25 years by NationsBank and was the site of a NationsBank branch. NationsBank is now in the process of constructing an office building on that site to be used as bank premises. The approximate cost of constructing the condominiums is \$13 million. The approximate value of the office building and the land is \$56 million. Thus, the condominiums would be ancillary to the office building being constructed. In fact, the office building and condominiums will form an integrated mixed-use development with the parking facility for both buildings to be located under the entire site.

Future real estate development projects are expected to be limited in number and will in all cases be confined to those areas adjacent to or near NationsBank premises. These projects may include the construction of an office building to be sold to a third party, retail space or a residential building.

## II. Proposed Organization and Limitations

The Subsidiary will be organized as a corporation or other form of limited liability company, with NationsBank as the sole shareholder. To further insulate against liability, the Subsidiary will comply with all of the corporate safeguard requirements set forth in 12 C.F.R. § 5.34(f). Thus:

1. The Subsidiary will be physically separate and distinct in its operations from the Bank;
2. The Subsidiary will be held out as separate and distinct from the Bank in its written material and direct contact with third parties, and all written marketing materials will clearly state that (i) the Subsidiary is a separate entity from the Bank and (ii) the obligations of the Subsidiary are not obligations of the Bank;

3. The Subsidiary's name will be different from that of NationsBank, and to the extent that the names are similar, the Bank and the Subsidiary will take steps to avoid customer confusion;
4. The Subsidiary will be adequately capitalized under relevant industry standards and will maintain capital adequate to cover reasonably expected losses and expenses;
5. The Subsidiary will maintain separate accounting and corporate records;
6. The Subsidiary will conduct its operations pursuant to independent policies and procedures that are also intended to inform customers that the Subsidiary is an organization separate from NationsBank;
7. All contracts between the Subsidiary and NationsBank (or any of its affiliates) will be on term and conditions substantially comparable to those available to or from independent entities;
8. The Subsidiary will observe appropriate separate corporate formalities, such as separate board of directors' meetings;
9. The Subsidiary will maintain a board of directors at least one-third of whom will not be directors of the Bank and will have relevant expertise capable of overseeing the Subsidiary's activities;
10. The Subsidiary and the Bank will have internal controls adequate to manage the financial and operational risks associated with the Subsidiary;
11. The Bank's capital and total assets will be reduced by an amount equal to the bank's equity investment in the Subsidiary, and the Subsidiary's assets and liabilities will not be consolidated with those of the Bank;<sup>1</sup>
12. The standards of Sections 23A and 23B of the Federal Reserve Act will apply to, and be enforced and applied by the OCC with respect to, transactions between the Subsidiary and the Bank;

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<sup>1</sup> The Bank will reduce its capital and total assets based on the actual amount of capital and assets of the Subsidiary as measured at the end of each calendar quarter.

13. NationsBank will remain an “eligible bank” as defined in 12 C.F.R. § 5.33(g) (after taking into consideration the capital deduction discussed above), and if the Bank ceases to be well capitalized for two consecutive quarters, the Bank will submit an acceptable plan to become well capitalized or will divest or otherwise terminate the activities of the Subsidiary; and
14. All loans to, investments in and advances to the Subsidiary will not exceed two percent of the Bank’s Tier 1 capital.

### III. Permissibility of the Proposed Activities

Under section 5.34(f), a national bank may establish or acquire an operating subsidiary to engage in an activity “authorized under section 5.34 for the subsidiary but different from that permissible for the parent national bank”. The OCC noted in its explanatory release accompanying the most recent revisions to Part 5 that permissible activities for an operating subsidiary “may include activities different from what the parent national bank may conduct directly, if, in the circumstances presented, the reason or rationale for restricting the parent bank’s ability to conduct the activity does not apply to the subsidiary, and if the ability of the subsidiary to conduct the activity would not frustrate a congressional purpose of preventing the activity from being undertaken by its parent bank”. In order to establish that the proposed activities are permissible for the Subsidiary, it must therefore be demonstrated that: (i) the proposed activities are part of banking or incidental to banking and (ii) approval of the proposed activities is not inconsistent with the policies of section 29 of the National Bank Act.

#### A. The Proposed Activities are Incidental to Banking

The OCC has broad authority to determine that a proposed activity is part of, or incidental to, the business of banking.<sup>2</sup> In determining whether an activity meets the foregoing standard, the OCC examines whether the activity is:

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<sup>2</sup> NationsBank of North Carolina, N.A. v. Variable Life Ins. Co., 115 S. Ct. 810 (1995).

- functionally equivalent to or a logical outgrowth of a recognized banking activity;
- responds to customer needs or otherwise benefits the bank or its customers; and
- involves risks similar in nature to those already assumed by banks.<sup>3</sup>

The Proposed Activities are a Functional Equivalent or a Logical Outgrowth of Recognized Banking Functions. –In this case, the Bank is requesting authority to undertake real estate development projects that are integrated with, and ancillary to, projects already constructed, or are in the process of being constructed, for use as bank premises. As the OCC has noted, the development of bank premises is incidental to the conduct of the banking business because it falls within a group of activities that “are incidental to the conduct of the banking business, and therefore permissible, even though they are not, substantively, banking activities.”<sup>4</sup> Rather, these activities “relate to the fact that the bank is in business, and can do the things that a business does” and are permissible powers, not because they relate to ‘banking’ activities, but because they are necessary, or at least convenient and useful, components of conducting business.”<sup>5</sup>

Because the projects that the Bank proposes to develop will be ancillary to and integrated with NationsBank premises, the authority to engage in the proposed activities is likewise ancillary, and therefore incidental to, the authority to develop premises. As discussed above, the underlying purpose of the proposed activities is to enhance those areas in which NationsBank does business. NationsBank is not proposing to develop real estate separate and apart from its premises and thus it is unnecessary to establish that real estate development by itself is incidental to banking.

The Proposed Activities Respond to Customer Needs or Otherwise Benefit the Bank or its Customers. As noted above, the Bank is applying to

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<sup>3</sup> See, e.g., OCC Corporate Decision #97-06 (January 22, 1997) (permitting the establishment of an operating subsidiary to reinsure mortgage insurance).

<sup>4</sup> Memorandum to Eugene L. Ludwig, Comptroller of the Currency, from Julie L. Williams, Chief Counsel, dated November 18, 1996 p. 3 (“Memorandum”).

<sup>5</sup>Id.

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engage in the proposed activities through the Subsidiary in order to gain increased flexibility in enhancing its premises locations. This flexibility will directly benefit the Bank's employees and customers by making its premises locations safer and more pleasant.

The Proposed Activities Present Risks Similar in Nature to Those Already Assumed by National Banks. The risks presented by the proposed activities are not materially different from those presented by a number of activities which are permissible for banks and bank holding companies. First, banks bear similar risks in developing, purchasing and selling bank premises. For example, in developing bank premises, banks often occupy only a portion of the property and lease or sell the remainder. Second, banks bear similar risks in making virtually any type of real estate secured loan. In fact, while the Bank cannot itself develop a residential building, it can make a loan to a developer to construct the very same building and thereby assume the same types of risk.

B. Approval of the Proposed Activities is Not Inconsistent with the Policies of Section 29

Section 29 of the National Bank Act prohibits a national bank from holding real estate except for certain specified purposes, including "as shall be necessary for its accommodation in the transaction of its business". As noted by the U.S. Supreme Court in the early case of Union National Bank v. Matthews, 98 U.S. 621 (1875), the purposes of the statute are to:

- "keep the capital of the banks flowing through the daily channels of commerce" (i.e., to prevent banks from diverting their financial resources from other, more valuable uses, such as commercial lending);
- prevent banks from engaging in "hazardous real estate speculation"; and
- prevent banks from accumulating large amounts of real estate.<sup>6</sup>

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<sup>6</sup> See also OCC Interpretive Letter No. 758 (April 6, 1996); OCC Interpretive Letter No. 556 (August 6, 1991); OCC Unpublished Interpretive Letter (July 8, 1993); and OCC Unpublished Interpretive Letter (June 8, 1987).

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NationsBank believes that the limited real estate development activities proposed herein are not inconsistent with the stated purposes of section 29, particularly in light of the safeguards to which the Bank has committed. In this regard, it is worth noting that no statutory bar exists to prevent bank holding companies from engaging in the proposed activities through a nonbank subsidiary. That is, there is no counterpart to section 29 that applies to the activities of a bank holding company or of its nonbank subsidiaries. While the Federal Reserve Board has not determined that real estate development is a permissible activity for bank holding companies, neither the Bank Holding Company Act of 1956, as amended, nor any other statute expressly bar the Federal Reserve Board from making such a determination. Thus, Congressional intent would not be frustrated by approval of this application.

In reviewing the proposal to engage in activities through an operating subsidiary that are not permissible for the parent bank, the OCC has stated that it

will consider and weigh (1) the form and specificity of the restriction applicable to the parent bank; (2) why the restriction applies to the parent bank; and (3) whether it would frustrate the purpose underlying the restriction on the parent bank to permit a subsidiary of the bank to engage in the particular activity.<sup>7</sup>

In performing this analysis, the OCC noted that it may “take into account any regulatory safeguards that apply to the operating subsidiary or to the activity itself, as well as additional conditions that may be imposed in connection with an application approval, and any further undertakings by the bank or the operating subsidiary that address the foregoing factors”.<sup>8</sup>

Preventing banks from diverting their financial resources. In this case, the Bank has committed that all loans to, investments in and advances to the Subsidiary will not exceed two percent of the Bank’s Tier 1 capital. In light of this limitation, approval of this application will have no discernible impact on the liquidity or lending capacity of the Bank. Thus, it will hardly be the case that approval of the application will result in a diversion of the Bank’s financial resources. Moreover, it is the Bank’s

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<sup>7</sup> Id.

<sup>8</sup>Memorandum at p. 24.

objective to sell projects that it develops in connection with the proposed activities as soon as practicable to facilitate the prompt return of its capital. For example, in the case of the condominiums, the Bank will endeavor to sell them as promptly as possible. Consequently, investments in the Subsidiary will no more divert the Bank's financial resources than if the Bank were to make a loan to a third party developer to construct projects that the Subsidiary otherwise would.

Preventing hazardous real estate speculation. The two percent cap will sufficiently contain any risks inherent in the proposed activities by limiting them to a de minimus scale. The commitment by the Bank to deduct its equity investment in the Subsidiary from the Bank's capital and total assets will further mitigate any risk by requiring the Bank to meet capital adequacy standards without counting the Subsidiary's capital. Implementation of generally accepted defenses against creditors of the Subsidiary piercing the Subsidiary's corporate veil to gain access to the assets of the Bank will further insulate the Bank from the risk of the proposed activities. Finally, as an additional safeguard against risk, the Bank has committed that if it ceases to be well capitalized for two consecutive quarters, it will submit an acceptable plan to become well capitalized or will divest or otherwise terminate the activities of the Subsidiary. With these limitations in place, NationsBank submits that the Subsidiary's activities cannot reasonably be viewed as posing a hazard to the Bank.

Risk stemming from the proposed activities are further mitigated by NationsBank's substantial experience in developing both commercial and residential real estate. NationsBank is continuously developing new premises to accommodate its rapid growth. In addition, NationsBank has been actively involved in the development and construction of low-income housing through its community development corporation. NationsBank is also in the process of completing the construction of a condominium building that it sponsored on land acquired through a workout and held as OREO.

Preventing banks from accumulating large amounts of real estate. In light of the de minimus scale of the Subsidiary's proposed activities, no concerns should arise regarding the accumulation of excessive amounts of real estate not otherwise permissible. The real estate projects to be developed by the Subsidiary will, in the aggregate, comprise a fraction of the real estate currently owned and occupied by NationsBank as premises. Moreover, as noted above, the Subsidiary will develop real estate in order



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to sell it, rather than to hold it; that is, the objective is not to accumulate real estate.

#### IV. Conclusion

The Bank expects that the establishment of the Subsidiary will result in substantial benefits for the Bank and its customers. For the foregoing reasons, the Bank believes that the formation of the Subsidiary is permissible under the OCC's regulations and consistent with prudent banking practices.

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Based on the foregoing, the proposed activities are part of the business of banking or incidental thereto, and therefore are permissible. The proposed activities do not otherwise pose any legal, policy, or supervisory concerns, and therefore NationsBank should be permitted to establish the Subsidiary and proceed with the proposed activities.

Accompanying this notice is a check payable to the OCC in the amount of \$2,700 for the filing fee for this notice. If you have any questions regarding the above, please call me at 704/386-4241 or Gerald P. Hurst at 704/386-7751.

Sincerely,

Richard K. Kim  
Assistant General Counsel

cc: Mr. Ralph E. Sharpe  
Mr. Richard T. Erb  
Mr. Timothy W. Long  
Eric Thompson, Esq.  
William Glidden, Esq.  
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